

## **CHAPTER 75-01-03 APPEALS AND HEARINGS**

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**75-01-03-01. Definitions.** In this chapter:

1. "Appeal" means a specific request for departmental review, by a dissatisfied applicant, recipient, provider, resident, registrant, or licensee concerning a decision made by a county agency, division of the department, or nursing facility.
2. "Appeal hearing" means an administrative procedure by which the department reviews a decision by considering evidence and argument presented by a claimant, by the entity that made the decision appealed from, or by representatives of either.
3. "Appeals supervisor" means the official designated by the department to be responsible for the administration of this chapter.
4. "Authorized representative" means an individual, including an attorney at law, who has been authorized by the claimant to act for and represent the claimant in any and all aspects of a hearing. The claimant need not designate an authorized representative.
5. "Claimant" means a person who has perfected an appeal.
6. "County agency" means a county social service board.
7. "Date of action" means the date upon which an action is intended to become effective.
8. "Department" means the North Dakota department of human services.
9. "Facility" means a nursing facility taking an action to transfer or discharge a resident.
10. "Fair hearing" means an appeal hearing, established pursuant to 42 U.S.C. 8624(b)(13), 7 CFR 273.15, 42 CFR part 431, subpart D, 45 CFR 205.10, 45 CFR 250.36(c), 45 CFR 255.2(h), 45 CFR 256.4(d), or any other federal law or regulation that specifically requires the department to provide a dissatisfied claimant an opportunity for a hearing that meets the requirements for due process of law imposed under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

11. "Filing date" of the claimant's appeal, in all cases except food stamp appeals, means the postmark date of mailed appeals, the delivery date of delivered appeals, the date of transmission of appeals made by facsimile transmission, or, if an oral appeal is permitted, the date of an oral appeal. The filing date of a request for fair hearing or administrative disqualification hearing in food stamp matters means the date the request is received in the office of the executive director of the department.
12. "Hearing officer" means any person assigned, appointed, or designated to preside in the hearing of an appeal or in an intentional program violation hearing under this chapter.
13. "Household" means an individual or group of individuals receiving or applying for food stamp benefits.
14. "Intentional program violation" means any:
  - a. Intentionally made false or misleading statement, or misrepresented, concealed, or withheld fact;
  - b. Intentionally committed act that constitutes a violation of the Food Stamp Act [7 U.S.C. 2011-2027], the food stamp program regulation [7 CFR parts 270-282], or any provision of the North Dakota Century Code or North Dakota Administrative Code relating to the use, presentation, transfer, acquisition, receipt, or possession of food stamp coupons; or
  - c. Action by an individual, for the purpose of establishing or maintaining a family's eligibility for aid to families with dependent children or for increasing or preventing a reduction in the amount of the grant, which is intentionally:
    - (1) A false or misleading statement or misrepresentation, concealment, or withholding of facts; or
    - (2) Any act intended to mislead, misrepresent, conceal, or withhold facts or propound a falsity.
15. "Intentional program violation hearing" means a hearing conducted for individuals or households accused of intentional program violations, who do not waive their rights to such a hearing, to determine if the individuals or household members committed, and intended to commit, intentional program violations.
16. "Regulation", as used in 42 CFR 431.210, 431.244, and 435.912, and 45 CFR 205.10(a)(4)(i)(B), includes any written statement of federal or state law or policy, including federal and state constitutions, statutes, regulations, rules, policy manuals or directions, policy letters

or instructions, and relevant controlling decisions of federal or state courts.

17. "Request for an intentional program violation hearing" means a written statement from a county agency, filed at the office of the appeals supervisor, which contains the name, mailing address, and telephone number (if any) of the charged household members or individuals, a detailed statement of charges against household members or individuals, and copies of all available evidence.
18. "Request for fair hearing" means a specialized appeal consisting of any clear written expression or in the case of a request in a food stamp matter under 7 CFR 273.15, any clear oral expression, from a claimant, or the claimant's duly authorized representative, filed in the office of the appeals supervisor, that the claimant wants the department to conduct a fair hearing to take action concerning the claimant's expressed reasons for dissatisfaction.
19. "Timely notice period" means that period beginning on the date a timely notice is mailed and concluding on the date of action.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-02. Vocational rehabilitation determinations - Administrative review procedures - Appeals.**

1. As used in this section:
  - a. "Claimant" means an applicant or eligible individual who is dissatisfied with any determination made by a vocational rehabilitation counselor or coordinator concerning the furnishing or denial of vocational rehabilitation services and who has made a timely request for review of the determination.
  - b. "Division" means the vocational rehabilitation division of the department.
  - c. "Party" or "parties" refers to the division and to a claimant.
  - d. "Request for review" means an appeal or a request for informal resolution made under this section.
2. A request for review is timely if the filing date of the request is no more than thirty days after notice of the determination with which the claimant is dissatisfied.

3. Informal resolution may be requested by a claimant. Informal resolution may be provided if it appears likely to be achieved within twenty days or if the parties agree to a delay in the hearing of the claimant's appeal. If informal resolution is not achieved and the parties do not agree to a delay, the hearing of the claimant's appeal must be conducted within forty-five days of the filing date of the claimant's request for review. An informal resolution is achieved when the parties so agree in writing.
4. A hearing officer must be selected:
  - a. From a pool of qualified, impartial hearing officers identified jointly by the department and the rehabilitation advisory council; and
  - b. (1) On a random basis; or  
(2) By agreement of the parties.
5. The hearing officer must conduct an appeal hearing within forty-five days of the filing date of the claimant's request for review, unless informal resolution is achieved or the parties agree to a delay.
6.
  - a. Except as provided in subdivision b, the division may not suspend, reduce, or terminate services provided under an individual written rehabilitation program pending final determination of the claimant's request for review.
  - b. The division may suspend, reduce, or terminate services provided under an individual written rehabilitation program:
    - (1) If the claimant so requests; or
    - (2) The agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the claimant.
7. The hearing officer shall recommend a decision based on the provisions of the Vocational Rehabilitation Act of 1973, as amended [29 U.S.C. 701, et seq.], the approved vocational rehabilitation state plan, federal and state vocational rehabilitation regulations and policies, and article 75-08, and shall provide to the claimant or, where appropriate, the claimant's representative, and to the director of the division, a full written report of the findings and grounds for the decision within thirty days of the completion of the hearing. The recommendation of the hearing officer becomes the decision of the division unless, within twenty days of issuance of the hearing officer's recommended decision, the director of the division notifies the claimant, in writing, of the director's intent to review the recommendation.

8. Prior to deciding to review the hearing officer's recommended decision under subsection 7, the director may secure assistance or advice from staff assistants without the communication of advice or assistance being treated as ex parte communication in violation of North Dakota Century Code section 28-32-12.1, if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
9. If the director decides to review the hearing officer's recommended decision under subsection 7, the director must first afford each party an opportunity to submit additional evidence and information relevant to a final decision. Any party who wishes to submit additional relevant evidence and information must transmit that evidence and information, or an abstract thereof, to the other party and to the director within five days after notice of the director's intent to review the hearing officer's recommended decision. Each party may, within five days after mailing or delivery of the evidence, information, or abstract provided by the other party, request an opportunity to provide the party's own evidence or information in a hearing to be called on at least ten days' notice, all pursuant to North Dakota Century Code section 28-32-07.
10. The director may overturn or modify a hearing officer's recommendation that supports the position of the claimant if the director concludes, based on clear and convincing evidence, that the recommendation is clearly erroneous because it is contrary to the Vocational Rehabilitation Act of 1973, as amended [29 U.S.C. 701, et seq.], the approved vocational rehabilitation state plan, federal or state vocational rehabilitation regulations and policies, or article 75-08.
11. Within thirty days of providing notice of intent to review the hearing officer's recommended decision, the director must make and provide to the parties a notice of decision.
12. The hearing officer or the director may grant reasonable extensions of time for good cause shown by either party, except that:
  - a. The hearing officer may extend the time for conducting an appeal hearing beyond forty-five days of the filing date of the claimant's request for review only if the parties are engaged in informal resolution and agree to the extension;
  - b. The twenty-day period, within which the director must notify the claimant of the director's intent to review the hearing officer's recommended decision, may not be extended; and
  - c. The thirty-day period, within which a dissatisfied claimant may request review, may not be extended.

13. The director may not delegate responsibility to make any final decision to any other person.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-05.1, 50-06.1-04

**Law Implemented:** NDCC 50-06-16, 50-06.1-10

#### **75-01-03-03. Fair hearing - Who may receive.**

1. An opportunity for a fair hearing is available to any applicant for or recipient of food stamps; aid to families with dependent children; job opportunities and basic skills training program; employment, education, or training-related child care; transitional child care; medicaid; children's health insurance program; or low income home energy assistance program benefits who requests a hearing in the manner set forth in this chapter and who is dissatisfied:
  - a. Because an application was denied or not acted upon with reasonable promptness; or
  - b. Because county agency or department action has resulted in the suspension, reduction, discontinuance, or termination of benefits.
2. An opportunity for a fair hearing is available to any resident who believes a facility has erroneously determined that the resident must be transferred or discharged.
3. An opportunity for a fair hearing is available to any individual who requests it because the individual believes the department has made an erroneous determination with regard to the preadmission and annual review requirements of 42 U.S.C. 1396r(e)(7).
4. The department may, on its own motion, review individual cases and make determinations binding upon a county agency. An applicant or recipient aggrieved by such determination shall upon request be afforded the opportunity for a fair hearing. All references in this chapter to appeals from decisions of county agencies must be understood to include appeals taken from determinations made by the department.
5. A fair hearing request may be denied or dismissed when the sole issue is one of state or federal law requiring automatic benefit adjustments for classes of recipients unless the reason for an individual appeal is incorrect benefit computation.
6. The claimant may first seek corrective action from the department or claimant's county agency before filing a request for a fair hearing.

7. If a claimant dies after a request for a fair hearing has been filed by the claimant, and before the decision of the department has been rendered in the case, the proceedings may be continued on behalf of the claimant's estate, or any successor, as that term is defined in North Dakota Century Code section 30.1-01-06, of the claimant if a representative of the estate has been appointed.
8. If a dissatisfied claimant dies before the claimant can file a request for a fair hearing, the duly appointed representative of the claimant's estate, or any successor, as that term is defined in North Dakota Century Code section 30.1-01-06, of the claimant if no representative of the estate has been appointed, may file such request when the claimant was dissatisfied with the denial of the claimant's application for assistance, or was dissatisfied with the benefits the claimant was receiving prior to the claimant's death.
9. A fair hearing under this section is available only if:
  - a. Federal law or regulation requires that a fair hearing be provided; and
  - b. The dissatisfied claimant timely perfects an appeal.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; August 1, 2005.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-03.1. Hearing rights - Fair hearings and intentional program violation hearings.** An individual or household member, or a representative, who requests a fair hearing or with respect to whom a notice of intentional program violation hearing has been issued, shall have adequate opportunity to:

1. Examine the contents of the individual's or household's case file and all documents and records to be used by the department, county agency, or nursing facility at the hearing, at a reasonable time before the date of the hearing, and during the hearing;
2. Present the case or have it presented by legal counsel or other person;
3. Bring witnesses;
4. Establish all pertinent facts and circumstances;
5. Advance arguments without undue interference; and



6. Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-03.2. Appeals from determinations of the department.**

1. A claimant aggrieved of a ratesetting decision of the department may perfect an appeal only if it is accompanied by written documents including all of the following information:
  - a. A copy of the letter received from the department advising of the department's decision on the claimant's request for reconsideration;
  - b. A statement of each disputed item and the reason or basis for the dispute;
  - c. A computation and the dollar amount that reflects the facility's claim as to the correct computation and dollar amount for each disputed item;
  - d. The authority in statute or rule upon which the facility relies for each disputed item; and
  - e. The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.
2. A claimant aggrieved by a licensing determination made by any unit of the department may perfect an appeal only if it is accompanied by written documents including all of the following information:
  - a. A copy of the letter received from the department advising of the department's decision on the claimant's request for reconsideration;
  - b. A statement of disputed facts, if any;
  - c. The authority in statute or rule upon which the claimant relies for each disputed item; and
  - d. The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.
3. A claimant not entitled to a fair hearing, whose appeal is not described in subsection 1 or 2, may perfect an appeal from a determination of a unit

of the department only if a statute or rule of the department specifies that such a claimant may appeal to the department and only in the manner provided for such an appeal.

4. A claimant entitled to a fair hearing of a food stamp matter under 7 CFR 273.15 may perfect an appeal by making a timely oral or written request for fair hearing.
5. A claimant entitled to a fair hearing concerning any matter except a food stamp matter under 7 CFR 273.15 may perfect an appeal by making a timely written request for a fair hearing.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-04. Withdrawal of appeal before decision.**

1. The claimant may withdraw an appeal at any time before a decision is made by the department.
2. In cases where there appears to be a possibility for corrective action without further appeal proceedings, the claimant may file a conditional withdrawal of the appeal. The conditional withdrawal does not prevent the claimant from filing a new appeal if the claimant remains dissatisfied with any such corrective action. No hearing shall be delayed or canceled because of this possibility unless the claimant consents to the delay.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-05. Claimant responsibility.**

1. The claimant must appeal in writing unless the request concerns a food stamp program decision. A claimant may appeal a food stamp program decision either orally or in writing. Oral requests must be clear expressions, made by the claimant or the claimant's authorized representative, to an employee of a county agency or the department to the effect that the claimant wishes to appeal a decision. The employee hearing such a request shall promptly reduce the request to writing and file it as provided by this chapter. An appeal need not be in any particular form. The county agency, division of the department, or nursing facility, which issued a decision with respect to which a claimant is entitled to, and requests, a fair hearing, shall assist the claimant in filing the claimant's appeal.

2. For the purpose of prompt action, the claimant may be informed that the claimant's appeal should identify the program involved as well as the reason for the claimant's dissatisfaction with the particular action involved in the case.

**History:** Effective September 1, 1979; amended effective July 1, 1980; January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-06. Time limit on appeals.**

1. The request for fair hearing by a household aggrieved by any action of a county agency that affects participation in the food stamp program must be filed within ninety days after the order or action with which the claimant is dissatisfied. In all other cases, except as provided in subsection 3, an appeal or a request for a fair hearing must be filed within thirty days after the order or action with which the claimant is dissatisfied unless a different limitation is specified in state or federal law for a particular class of cases.
2. The date of the order or action on which the appeal or request for fair hearing is based is the date on which notice of the order or action was mailed to the claimant except:
  - a. If requests for a fair hearing concern the return of erroneous repayments, the date of collection or the date of the last installment payment is the determining date; and
  - b. If requests for a fair hearing concern the amount of the grant, the request must be filed within thirty days, but the period of review will extend back only to the first of the month on which the first day of the thirty-day period occurred.
3. A request for a fair hearing by an individual whose medicaid benefits were denied, reduced, or discontinued because of a denial or discontinuance of disability status by the social security administration or state review team determination must be filed within six months after the official notification from the social security administration that disability status has been approved or reversed.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; May 1, 2006.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-06.1. Computation of time.** In computing any period of time prescribed or allowed by this chapter, the day of the act, event, or determination from which the designated period of time begins to run is not included. The last

day of the period so computed is included, unless it is a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-06.2. Giving of notice.**

1. Any notice required to be given by this chapter may be given by first-class mail or personal delivery unless some provision of law specifically requires notice to be given in another manner.
2. Any notice required to be given by certified or registered mail may be so given without requesting a return receipt unless some provision of law specifically requires a return receipt to be requested.
3. Any notice given by certified or registered mail, return receipt requested, is deemed to be effectively given if delivered or if refused.
4. Any notice required to be given by certified or registered mail, return receipt requested, if returned undelivered but not refused, may be supplemented by a notice given by first-class mail. A notice given by first-class mail, in supplementation of such a return notice, is deemed to have been received unless it is shown, by a preponderance of the evidence, that:
  - a. The mail was not properly addressed;
  - b. The mail containing the notice was returned by the postal service; and
  - c. The mailing of the notice cannot be shown by an affidavit.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 31-11-03(24), 50-06-05.1

#### **75-01-03-07. Explanation of right to fair hearing.**

1. The county agency, the department, if the action is taken by the department, or the facility, if action is taken to transfer or discharge a resident of the facility, must, at the times specified in subsection 2, inform the individual in writing:
  - a. Of the individual's right to a fair hearing;

- b. Of the method by which the individual may obtain a fair hearing; and
  - c. That the individual may represent him or herself or may use legal counsel, a relative, a friend, or other spokesperson.
2. The information described in subsection 1 must be provided:
- a. At the time the individual applies for benefits administered by the county agency under the direction and supervision of the department;
  - b. At the time of any action to grant, terminate, suspend, discontinue, or reduce such benefits, change the manner or form of an aid to families with dependent children payment to a protective vendor, or two-party payment, or reduce covered medicaid services;
  - c. At the time a facility notifies a resident of the facility that the resident is to be transferred or discharged; and
  - d. At the time an individual receives an adverse determination by or on behalf of the department with regard to the preadmission screening and annual resident review requirements of 42 U.S.C. 1396r(e)(7).

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08. Timely and adequate notice - Assistance pending hearing.**

- 1. A notice is adequate if it includes:
  - a. An explanation of the type of proposed action;
  - b. An explanation of the reason for the proposed action and the regulation or law upon which the action is based; and
  - c. An explanation of the person's right to request corrective action from the county agency and the department, the person's right to request a fair hearing, and the circumstances under which assistance will be continued if a fair hearing is requested.
- 2. A notice is timely if mailed at least five days prior to the date of action based on subsection 3, and at least ten days prior to the date of any other action.

3. Except in food stamp cases, if facts indicate that assistance should be discontinued, suspended, terminated, or reduced because of suspected fraud by the recipient, and, where possible, such facts have been verified through collateral sources, notice of a benefit adjustment is timely if mailed at least five days prior to the effective date of the proposed action.
4. If county agency or department action results in a denial of medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program benefits, an adequate written notice must be sent to the person affected.
5. Except as provided in subsection 6, if county agency or department action results in a discontinuance, termination, suspension, withholding, or reduction of medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program benefits, a timely and adequate written notice must be sent to the person affected.
6. If county agency or department action results in a discontinuance, termination, suspension, withholding, or reduction of medicaid, aid to families with dependent children, food stamp, or low income home energy assistance program benefits, an adequate written notice must be sent to the person affected no later than the date of action if:
  - a. The county agency or department has factual information confirming the death of the person affected;
  - b. The county agency or department receives a clear written statement signed by the person affected that the person no longer wishes assistance; or that gives information which requires discontinuance or reduction of assistance and the person has indicated, in writing, that the person understands that this must be the consequence of supplying such information;
  - c. The person affected has been admitted or committed to an institution, and further payments to that individual do not qualify for federal financial participation under the state plan;
  - d. The person affected has been placed in a nursing facility or is receiving long-term hospitalization;
  - e. The whereabouts of the person affected are unknown and mail directed to the person has been returned by the post office indicating no known forwarding address;
  - f. An aid to families with dependent children child is removed from the home as a result of a judicial determination, or voluntarily placed in foster care by the child's parent or legal guardian;

- g. The person affected has been accepted for assistance in new jurisdiction and that fact has been established by the county previously providing assistance;
- h. A change in level of medical care is prescribed by the recipient patient's physician or other practitioner of the healing arts;
- i. A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance shall automatically terminate at the end of the specified period;
- j. The state or federal government initiates a mass change which uniformly and similarly affects all similarly situated applicants, recipients, and households;
- k. A determination has been made, based on reliable information, that all members of a household have died;
- l. A determination has been made, based on reliable information, that the household has moved from the project area;
- m. The household has been receiving an increased allotment to restore lost benefits, the restoration is complete, and the household was previously notified in writing of when the increased allotment would terminate;
- n. The household's allotment varies from month to month within the certification period to take into account changes anticipated at the time of certification, and the household was so notified at the time of certification;
- o. The household jointly applied for public assistance and food stamp benefits and has been receiving food stamp benefits pending the approval of the public assistance grant and was notified at the time of certification that food stamp benefits would be reduced upon approval of the public assistance grant;
- p. A household member is disqualified for an intentional program violation, or the benefits of the remaining household members are reduced or terminated, to reflect the disqualification of that household member;
- q. The household contains a member subject to a lockout or strike or signs a waiver of its right to notice of adverse action for purposes of receiving a longer certification period than is otherwise allowed for such households;

- r. The county agency or department has elected to assign a longer certification period to a household certified on an expedited basis and for whom verification was postponed, provided the household has received written notice that the receipt of benefits beyond the month of application is contingent on its providing the verification which was initially postponed and that the county agency or department may act on the verified information without further notice;
  - s. The action is based upon information the recipient furnished in a monthly report; or
  - t. The action is taken because the recipient has failed to submit a complete or timely monthly report without good cause.
7. In any case where assistance has been discontinued, suspended, withheld, or reduced without timely notice, if the person affected requests a fair hearing within ten days of the mailing of the notice of action, assistance must be reinstated retroactively and the provisions of subsection 9 shall apply.
8. If, within the timely notice period, the person affected indicates a wish for a conference, that person or that person's authorized representative will be given an opportunity by the county to discuss the problems, and will be given an explanation of the reasons for the proposed action, and will be permitted to show that proposed action is incorrect.
- a. During this conference, the person affected will be permitted to represent himself or herself or be represented by legal counsel or by a friend or other spokesman.
  - b. The conference does not diminish the person's right to a fair hearing.
9. Where the person affected is a recipient and has filed a request for a fair hearing within the timely notice period, the assistance will be continued without implementation of the proposed action, until the fair hearing decision is rendered, unless:
- a. Prior thereto the claimant unconditionally withdraws or abandons the fair hearing request;
  - b. Prior thereto the department reverses the proposed action without a hearing;
  - c. The department determines, based upon the record of the claimant's fair hearing, that the issue involved in such hearing is



one of state or federal law or change in state or federal law and not one of incorrect benefit computation;

- d. A change affecting the recipient's benefits occurs before the decision on the request for fair hearing and the recipient fails to file a timely request for a fair hearing after notice of such change; or
  - e. A food stamp household's certification period expires.
- 10. Any assistance continued under subsection 9 is subject to recovery if the claimant does not prevail in the claimant's appeal.
  - 11. Any notice that is the subject of a request for fair hearing may be supplemented at any time before the conclusion of the hearing. The information in any supplemental notice must be considered in determining the adequacy of the notice unless the claimant shows that the claimant is prejudiced by that consideration.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08.1. Notice of facility's intention to transfer or discharge a resident.**

- 1. For purposes of this section:
  - a. "Discharge" means movement from a facility to a noninstitutional setting when the discharging facility ceases to be legally responsible for the care of the resident.
  - b. "Resident" includes a person who has been admitted and any legal representative of the resident.
  - c. "Transfer" means movement from a facility to another institutional setting when the legal responsibility for the care of the resident changes from the transferring facility to the receiving institutional setting.
- 2. Except as provided in subsection 4, a facility shall issue a written notice of involuntary transfer or discharge, which meets the requirements of subsection 3, at least thirty days before the date of intended transfer or discharge. The first day of that thirty-day period is the day after the date of issuance. The date of issuance is the day notice is delivered or mailed to the resident.
- 3. The notice provided by the facility must contain:

- a. A statement that the facility intends to transfer or discharge the resident, as the case may be;
- b. The reason for the transfer or discharge;
- c. The effective date of the transfer or discharge;
- d. The location to which the resident is to be transferred or discharged;
- e. The specific provision of subsection 7 authorizing the transfer or discharge, or the change in federal or state law requiring the action;
- f. A statement that the resident has the right to appeal the intended transfer or discharge to the department, and the mailing address to which an appeal must be sent;
- g. The name, address, and telephone number of the state long-term care ombudsman;
- h. If the resident is developmentally disabled or mentally ill, the address and telephone number of the committee on protection and advocacy office that serves the area in which the resident resides;
- i. If the medicaid program is paying for some or all of the cost of services furnished to the resident by the facility, a statement that those medicaid payments will continue until after the hearing unless:
  - (1) The sole issue at the hearing is one of state or federal law or policy and the resident is so informed in writing; or
  - (2) Some change in circumstances affects the resident's eligibility for medicaid benefits and the resident is so notified in writing.
- j. A statement that the transfer or discharge will be delayed, if a request for fair hearing is filed before the effective date of the transfer or discharge:
  - (1) In the case of a discharge for nonpayment of facility charges, at least until the hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and
  - (2) In all other cases, until the fair hearing decision is rendered.
- k. A statement that the resident may represent himself or herself at the hearing or may use legal counsel, a relative, a friend, or other spokesperson.

4. a. A facility need not provide a notice under subsection 2 if the resident:
  - (1) Provides a clear written statement, signed by the resident, that the resident does not object to a proposed transfer or discharge; or
  - (2) Gives information that requires a transfer or discharge and indicates that the resident understands that a transfer or discharge will result.
- b. A facility must issue a notice that meets the requirements of subsection 3, as soon as practicable before an involuntary transfer or discharge, when:
  - (1) The safety of individuals in the facility would be endangered;
  - (2) The health of individuals in the facility would be endangered;
  - (3) The transfer or discharge is appropriate because the resident's health has improved sufficiently to allow a more immediate transfer or discharge;
  - (4) An immediate transfer or discharge is required by the resident's urgent medical needs which cannot be met in the facility; or
  - (5) The resident has not resided in the facility for thirty days.
5. A resident of a facility may appeal a notice from the facility of intent to discharge or transfer the resident. A resident has appeal rights when the resident is transferred from a certified bed to a noncertified bed or from a bed in a certified facility to a bed in a facility certified as a different provider. A resident has no appeal rights when the resident is moved from one bed in a certified facility to another bed in the same certified facility. A resident has no appeal rights if the transfer or discharge has taken place and the resident did not appeal within thirty days after the date of issuance of a notice that meets the requirements of subsection 3.
6. If a resident with appeal rights files an appeal before the effective date of the transfer or discharge, the resident shall not be transferred or discharged:
  - a. In the case of a discharge for nonpayment of facility charges, earlier than the date a hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and
  - b. In all other cases, until the fair hearing decision is rendered.

7. A facility may not discharge or transfer a resident unless:
- a. The resident has an urgent medical need, which cannot be met in the facility;
  - b. The resident's physical condition endangers or poses a threat to the health or safety of the resident or other persons in the facility;
  - c. In cases involving a mental condition or behavioral problem, the behavior of the resident creates a serious and immediate threat to the resident or other residents or persons in the facility and all reasonable alternatives to transfer or discharge, consistent with the attending physician's orders, have been attempted and documented in the resident's medical record;
  - d. The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
  - e. The resident was accepted by the facility for the purpose of receiving specialized services and has fully benefited from those services or can no longer benefit from those services, provided that the purpose of the admission and the expected length of stay were agreed to, in writing, by or on behalf of the resident, prior to admission;
  - f. The resident's health or safety is at risk because the facility cannot reasonably accommodate the needs of the resident;
  - g. A public official with jurisdiction over matters of health or safety, in the performance of official duties, determines the health or safety of the resident is endangered by continued residence in the facility;
  - h. The facility's license is revoked, suspended, or not renewed, or the facility's participation in medicare or medicaid is terminated;
  - i. The facility intends to cease operations; or
  - j. The resident fails to pay, or to arrange for payment of, charges based on the daily rate established under chapter 75-02-06, provided that no involuntary transfer or discharge may be based on a failure to pay charges for private rooms, holding a bed for a period in excess of the covered bed hold period set forth in section 75-02-06-14, special services not included in the daily rate, or medicare part B coinsurance and deductible.

**History:** Effective February 1, 1995; amended effective July 1, 1996; May 1, 2006.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-08.2. Notice of preadmission screening and resident review determinations.**

1. An individual dissatisfied with an adverse determination made with regard to the preadmission screening and resident review requirements of 42 U.S.C. 1396r(e)(7)(A) or (B) may request a fair hearing in review of that determination.
2. The right to request a fair hearing under subsection 1 arises upon receipt of a notice under subsection 3.
3. If the department's action in administering preadmission screening and resident review is adverse to an individual, the department shall provide to the individual a written notice which conforms to section 75-01-03-07 and which includes:
  - a. A statement of the adverse determination;
  - b. The reason for the adverse determination;
  - c. The date of the adverse determination; and
  - d. A statement that 42 U.S.C. 1396r(e)(7) requires the department to make such determinations.
4. For purposes of this section and sections 75-01-03-07 and 75-01-03-09.2:
  - a. "Adverse determination" means a determination made in accordance with 42 U.S.C. 1396r(b)(3)(F) or 42 U.S.C. 1396r(e)(7)(B), through the application of section 75-02-02-09, that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services, but does not mean a determination, made under 42 CFR 483.128, that an individual is not suspected of having mental illness or mental retardation; and
  - b. "Significant change" means:
    - (1) A significant physical status improvement experienced by a nursing facility resident, such that the resident is more likely to respond to special treatment for that condition or might be considered appropriate for a less restrictive alternative setting;
    - (2) The presence of a nursing facility resident's mental illness, mental retardation, or condition related to mental retardation, not identified prior to admission, when it later emerges or is discovered;

- (3) Exhibition of increased symptoms of mental illness or behavioral problems by a nursing facility resident; or
  - (4) A circumstance arising if a review resulted in a determination requiring inpatient psychiatric treatment for a nursing facility resident, and an update to that determination is needed to support that individual's admission or readmission to a nursing facility following delivery of psychiatric services.
5. Preadmission screening and resident review, including determinations of significant change, is undertaken applying professional judgment and standards approved by the department that are consistent with the requirements of 42 CFR part 483, subpart C, and 42 U.S.C. 1396r(f)(8).

**History:** Effective February 1, 1995; amended effective April 1, 1999.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

### **75-01-03-08.3. Notice of intentional program violation hearing.**

1. A written notice of an intentional program violation hearing must contain:
- a. The date, time, and place of the hearing;
  - b. The charge against the individual or household member;
  - c. A summary of the evidence, and how and where the evidence can be examined;
  - d. A warning that the decision will be based solely on evidence provided by the department or county agency if the individual or household member fails to appear at the hearing;
  - e. A statement that the individual or household member may request a postponement of the hearing, provided that the request for postponement is made at least ten days in advance of the scheduled hearing;
  - f. A statement that the individual, household member, or representative will have ten days from the date of the scheduled hearing to represent good cause for failure to appear in order to receive a new hearing;
  - g. A description of the penalties that can result from a determination that the individual or household member has committed an intentional program violation and a statement of which penalty the department or county agency believes applicable to the case;

- h. A listing of the rights of the individual or household member, as set forth in section 75-01-03-03.1;
- i. A statement that the hearing does not preclude the state or federal government from prosecuting the individual or household member for an intentional program violation in any civil or criminal action, or from collecting overissuances or overpayments;
- j. A listing of individuals or organizations that provide free legal representation to individuals or household members alleged to have committed intentional program violations and that have authorized the department to include their name, address, and telephone number on such list;
- k. An explanation that the individual or household member may waive the individual's or household member's right to appear at an intentional program violation hearing;
- l. A statement of the accused individual or household member's right to remain silent concerning the charge, and that anything said or signed by the individual concerning the charge may be used against the individual in a court of law; and
- m. A statement that the individual or household member may waive the right to appear at an intentional program violation hearing that includes:
  - (1) The date the signed waiver must be received by the department or county agency to avoid the holding of a hearing;
  - (2) A signature block for the accused individual, along with a statement that the head of or caretaker relative must also sign the waiver if the accused individual is not the head of household or caretaker relative, with an appropriately designated signature block;
  - (3) The fact that a waiver of the right to appear at the intentional program violation hearing will result in a disqualification penalty and a reduction in benefits or assistance payment for the appropriate period, even if the accused individual does not admit to the facts presented by the department or county agency;
  - (4) An opportunity for the accused individual to specify whether the individual admits to the facts as presented by the department or county agency; and

- (5) In food stamp matters, a telephone number to contact for additional information and a statement that remaining household members, if any, will be held responsible for repayment of the resulting claim.
2. All notices alleging an intentional program violation concerning the food stamp program must either:
  - a. Have attached a copy of the department's published hearing procedures; or
  - b. Inform the household of its right, upon request, to obtain a copy of the department's published hearing procedures.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09. County agency responsibility prior to fair hearing concerning assistance or benefits.**

1. Upon receipt of the notice from the appeals supervisor that a recipient has filed a request for a fair hearing with the supervisor's office, the county agency shall immediately ascertain whether the request for fair hearing was filed within the timely notice period. If the request was not filed within that period, the county agency shall neither reinstate nor continue aid except that households appealing adverse food stamp program actions may have benefits continued if the household can show good cause for the failure to file a request within ten days.
2. Upon receipt of notice of a request for fair hearing the county agency shall, no later than the fifth day after receiving the request, provide the office of the appeals supervisor with all information pertinent to the request.
3. Prior to the fair hearing, the county agency shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence. When assistance of the department is required to clarify any question, such assistance shall be sought without delay;
  - b. Organize all oral and written evidence and plan for its presentation at the hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the hearing;



- d. Arrange for the attendance of all witnesses necessary for the presentation of the case;
- e. Notify the appeals supervisor of any communication problem the claimant may have;
- f. Notify the appeals supervisor of any hearing site access problem the claimant may have;
- g. Prepare a complete final budget computation, month by month, for the period subject to review, and up to the date of hearing, if the issue is:
  - (1) Amount of aid;
  - (2) Grant adjustment; or
  - (3) Demand for repayment;
- h. Remain in touch with the claimant, and report without delay to the appeals supervisor any change in the claimant's address or in any other circumstances that might affect the necessity for or conduct of the hearing; and
- i. Arrange to have present at the hearing a county agency representative with full authority to make binding agreements and factual stipulations on behalf of the county agency.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09.1. Facility responsibility prior to fair hearing concerning transfer or discharge.**

- 1. Upon receipt of notice of a request for fair hearing, the nursing facility, no later than the fifth day after receiving the request, shall provide the appeals supervisor with all information pertinent to the request.
- 2. Prior to the fair hearing, the nursing facility shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence;
  - b. Organize all oral and written evidence and plan for its presentation at the hearing;

- c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the hearing;
- d. Arrange for the attendance of all witnesses necessary for the presentation of the nursing facility's case;
- e. Notify the appeals supervisor of any communication problem or hearing facility access problems the resident may have;
- f. Notify the appeals supervisor of any hearing site access problem the resident may have;
- g. Notify the appeals supervisor of any change in the resident's circumstances that may affect the necessity for or the conduct of the hearing; and
- h. Arrange to have present at the hearing a nursing facility representative with full authority to make binding agreements and stipulations.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-09.2. Department responsibility prior to fair hearing concerning preadmission screening and annual resident review.**

- 1. Upon receipt of a request for fair hearing, the unit of the department that made the adverse determination, no later than the fifth day after receiving the request, shall provide the appeals supervisor with all information pertinent to the request.
- 2. Prior to the fair hearing, the unit of the department that made the adverse determination shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence;
  - b. Organize all oral and written evidence and plan for its presentation at the hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the hearing;
  - d. Arrange for the attendance of all witnesses necessary for the presentation of the unit's case;

- e. Notify the appeals supervisor of any communication problem the claimant may have;
- f. Notify the appeals supervisor of any hearing site access problem the claimant may have;
- g. Notify the appeals supervisor of any change in the claimant's circumstances that may affect the necessity for or the conduct of the hearing; and
- h. Arrange to have present at the hearing a unit representative with full authority to make binding agreements and factual stipulations.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

### **75-01-03-09.3. Department responsibility prior to appeal hearing.**

- 1. Upon receipt of notice of an appeal, which does not involve a request for a fair hearing, the unit of the department that made the adverse determination, no later than the fifth day after receiving the notice of appeal, shall provide the appeals supervisor with all information pertinent to the appeal.
- 2. Prior to the hearing of the appeal, the unit of the department that made the adverse determination shall:
  - a. Review the applicable statutes, regulations, rules, and policies in light of the evidence;
  - b. Organize all oral and written evidence and plan for its presentation at the appeal hearing;
  - c. Prepare copies of all written evidence and relevant statutes, regulations, rules, and policies for presentation at the appeal hearing;
  - d. Arrange for the attendance of all witnesses necessary for the presentation of the unit's case;
  - e. Notify the appeals supervisor of any change in the resident's circumstances that may affect the necessity for or the conduct of the appeal hearing; and

- f. Arrange to have present at the appeal hearing a unit representative with full authority to make binding agreements and factual stipulations.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-10. Hearing in county other than county responsible for aid - Procedure.** Repealed effective February 1, 1995.

**75-01-03-11. Group hearings.**

1. The appeals supervisor may schedule a series of appeals for a group hearing when the sole issue set forth in the request is one involving state or federal law or policy or changes in state or federal law, as the supervisor may deem appropriate.
2. In all group hearings, individual claimants may present their own cases, and each may be represented by any person the claimant may desire.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-12. Compliance with department decisions.** Immediately upon receipt of notice of a decision, the county agency shall comply with the decision.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-13. Acknowledgment of appeal.**

1. An appeal must be acknowledged by a written communication to the claimant and to the county agency, nursing facility, or unit of the department that made the determination under appeal.
2. The claimant who is entitled to a fair hearing shall also be provided with a list of all free legal service organizations available to the claimant and that have authorized the department to include their name, address, and telephone number on such list.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-14. Hearing - Place and notification.**

1. The hearing of the appeal may be held in the county seat of the county in which the claimant is living at the time of the hearing, at the regional office serving such county, at any public building convenient to the parties, or at any other location agreeable to the parties. If the claimant is unable to travel to the hearing site because of the claimant's health, transportation problems, or other reasons, the claimant shall promptly notify the county agency, nursing facility, or unit of the department that made the determination under appeal. The hearing shall be conducted at a reasonable time, date, and place to be set by the office of administrative hearings.
2. The office of administrative hearings shall mail or deliver to the claimant, the claimant's authorized representative, if any, and the county agency, nursing facility, or unit of the department (whichever made the determination under appeal) a written notice of the time and place of the hearing. In all food stamp appeals, the notice must be sent not less than ten days prior to the hearing unless the household should, in writing, request less advance notice to expedite the scheduling of the hearing.
3. The office of administrative hearings shall mail or deliver to the household and its authorized representative, if any, the individual (in a proceeding involving aid to families with dependent children), and the county agency a written notice of an intentional program violation hearing, that conforms to the requirements of section 75-01-03-08.3, not less than thirty days prior to the hearing, unless the hearing is combined with a fair hearing and the individual or household member requests that the thirty-day period be waived.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-14.1. Consolidation of intentional program violation hearing with fair hearing.** A fair hearing and an intentional program violation hearing may be combined into a single hearing if the factual issues arise out of the same or related circumstances and the individual or household receives advance notice that the hearings will be combined. The times for conducting an intentional program violation hearing will apply when there is a single hearing, but the individual or household is entitled to a waiver of the thirty-day advance notice period upon its request.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

### **75-01-03-15. Hearing - General rules and procedure.**

1. Attendance at the hearing shall be limited to those directly concerned, namely, the claimant; the claimant's representative, if any; an interpreter, if any; witnesses; representatives of the county agency, nursing facility, or unit of the department that made the determination under appeal; and the hearing officer. The hearing officer shall exclude unauthorized persons from a fair hearing unless both principals agree to their presence. The hearing officer may exclude persons whose actions cause substantial disruption of the hearing. Appearance by the claimant, in person or by representative, is required at a fair hearing. Representation by the county agency, nursing facility, or unit of the department that made the determination under appeal is also required.
2. Hearings may be conducted by telephone unless the person requesting the hearing demands to appear personally before the hearing officer. In all food stamp telephone hearings, except food stamp intentional program violation hearings, the person requesting the hearing shall be present at the same location as the county agency representative. This provision may be waived by the department when illness, disability, travel difficulty, or other reason makes attendance of the person requesting the hearing, or that person's representative, at the location of the county agency representative impracticable.
3. Witnesses may give testimony by telephone unless the hearing officer determines that it will be unreasonably difficult to judge the witness's credibility without the witness's presence before the hearing officer. The party calling a witness by telephone shall provide reliable identification of the witness and assume responsibility for providing a satisfactory telephone connection. A party intending to call a witness by telephone shall provide notice of that intention to the administrative law judge and to the other parties at least three days before the date of the witness's intended testimony unless the administrative law judge determines arrangements for a satisfactory telephone connection may be made on shorter notice.
4. The hearing must be conducted in an impartial manner. All testimony must be submitted under oath or affirmation.
5. The proceedings at the hearing must be reported or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.
6. The hearing officer shall consider if the parties or their representatives are familiar with the North Dakota Rules of Evidence and shall waive application of those rules unless all parties to the proceeding or their representatives are familiar with the North Dakota Rules of Evidence. The waiver, if necessary, must be stated prior to or at any hearing.

7. An interpreter shall be provided by the state if the hearing officer determines this necessary.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; January 1, 1997.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-15.1. Intentional program violation hearing - Procedure.**

1. The department or the county agency has the burden of proving an intentional program violation by clear and convincing evidence.
2. The hearing officer shall advise the individual or household member that he or she may refuse to answer questions during the hearing.
3. If the individual or household member, or a representative, cannot be located or fails to appear at the hearing without good cause, as determined by the hearing officer or by the appeals supervisor, the hearing shall be conducted as scheduled, without the household's representation.
4. The hearing shall be conducted, the decision arrived at, and the individual or household member and the county notified of the decision within ninety days of the date the household member is notified in writing that the hearing has been scheduled.
5. The hearing officer's recommended decision must specify the reasons for the decision, identify the supporting evidence, identify the pertinent regulations, and respond to reasoned arguments made by the individual, household member, or representative.
6. If a hearing has been conducted without the individual, household member, or representative present, and the individual or household member is determined to have committed an intentional program violation, the individual or household member has ten days from the date of the scheduled hearing to present reasons indicating good cause for failure to appear. If a hearing officer or the appeals supervisor later determines there was good cause for the failure to appear, a new hearing must be conducted.
7. There is no further administrative appeal after the intentional program violation hearing. A subsequent fair hearing procedure cannot reverse a determination of an intentional program violation arising out of an intentional program violation hearing.

**History:** Effective February 1, 1995.

**General Authority:** NDCC 28-32-05, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

### **75-01-03-15.2. Hearing - Issues to be considered.**

1. Except as provided in subsection 2, or as specifically required in any law or rule describing the determination of issues at a hearing, the issues for consideration in a hearing requested to review a decision issued by the department, a county agency, or a facility are limited to matters described in the decision notice.
2. A person seeking a hearing in review of a decision issued by the department, a county agency, or a facility may raise additional issues only if the person:
  - a. Provides, at least ten days before the date set for the hearing:
    - (1) A written statement of additional issues;
    - (2) A copy of any documents and a description of any exhibit proposed for introduction in support of the additional issues; and
    - (3) A brief synopsis of testimony of any proposed witness relating to the additional issues;
  - b. Consents to a continuance, waives any requirement that a decision be made within a limited time, and:
    - (1) If the person is a recipient receiving continued benefits until a fair hearing decision is reached, secures consent of the department; or
    - (2) If the person is appealing a notice of intention to transfer or discharge a resident, secures consent of the facility; or
  - c. Secures the consent of the department or facility.

**History:** Effective January 1, 1997.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-16. Economic assistance claimant living outside of North Dakota.** When a request for fair hearing is received from an applicant for or recipient of medicaid, aid to families with dependent children, food stamps, or low income home energy assistance program benefits, who is living outside of the state, it must be acknowledged and reported in the same manner as other requests for fair hearing. Unless the claimant returns to North Dakota for the hearing or



authorizes a representative in North Dakota, the hearing will be conducted by telephone.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-17. Continuance for additional evidence.**

1. If, after a hearing has begun, the hearing officer conducting the hearing determines that additional evidence not available at the hearing is necessary for the proper determination of the case, the hearing officer may continue the hearing to a later date. In connection therewith, the hearing officer may order further investigation and may direct either party to produce the additional evidence.
2. In order to permit the reception of additional documentary evidence or written argument, the hearing officer may close the hearing and hold the record open for a stated period if the request for additional time is accompanied by a written waiver of the requirement that a decision be made within ninety days, as found at 7 CFR 273.16(e)(2)(iv), 42 CFR 431.244(f), and 45 CFR 205.10(a)(16) or sixty days, as found at 7 CFR 273.15(c)(1). If the request for additional time is not accompanied by such a written waiver, the record shall be held open for no more than three additional days. If an expedited hearing has been requested, no additional time may be granted unless a written withdrawal of the request for an expedited hearing accompanies the request for additional time.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-18. Withdrawal or abandonment.**

1. An appeal may not be dismissed without hearing unless:
  - a. The claimant withdraws or abandons the appeal;
  - b. The department reverses the decision appealed from without a hearing; or
  - c. Informal resolution of a vocational rehabilitation request for review is achieved.
2. A withdrawal occurs when the hearing officer is notified by the claimant that the claimant no longer wishes a hearing.

3. An abandonment occurs when:

- a. The claimant or the claimant's authorized representative fails to appear at the hearing without good cause; or
- b. The claimant cannot be located through the claimant's last address of record, or through the claimant's authorized representative, and such inability to locate the claimant precludes the scheduling of a hearing.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-19. Errors or delays by officials.** Errors made by public officials or delays caused by public officials may not form the basis for an award of any benefit to an adversely affected applicant or recipient who would not have been eligible to receive that benefit in the absence of the error or delay.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-20. Appeals procedures for determinations affecting participation of intermediate care facilities for the mentally retarded and certain nursing facilities in medicaid.**

1. a. This section sets forth the appeals procedures the department makes available:
  - (1) To a nursing facility that is dissatisfied with the department's finding of noncompliance that has resulted in an enforcement action under chapter 75-02-05.2; or
  - (2) To an intermediate care facility for the mentally retarded that is dissatisfied with the department's finding of noncompliance with medicaid program requirements that has resulted in the denial of a provided agreement or the termination or nonrenewal of its provided agreement as a sanction imposed under paragraph 1 of subdivision a of subsection 2 of section 75-02-05-08.
- b. This section also sets forth the special rules that apply in particular circumstances, the limitations on the grounds for appeal, and the scope of review during a hearing.

2.
  - a. Except as provided in subdivision b, a facility is entitled to a full evidentiary hearing, as described in subsection 3, on any of the actions specified in subsection 1.
  - b. A facility may not appeal:
    - (1) The choice of sanction or remedy;
    - (2) The state monitoring remedy;
    - (3) The loss of approval for a nurse aide training program; or
    - (4) The level of noncompliance found by the state survey agency except when a favorable decision would affect the amount of the civil money penalty imposed under section 75-02-05.2-02.
3. The appealing facility is entitled:
  - a. To appear before an impartial hearing officer to refute the finding of noncompliance upon which the department has based an action taken under subsection 1;
  - b. To be represented by counsel or other representative; and
  - c. To be heard directly or through its representative, to call witnesses, and to provide documentary evidence.
4. In appeals disputing the imposition of a civil money penalty:
  - a. The department's finding as to a nursing facility's level of noncompliance must be upheld unless it is clearly erroneous; and
  - b. Upon a finding that a basis for imposing a civil money penalty exists, the appeal decision may not:
    - (1) Set a penalty of zero or reduce a penalty to zero;
    - (2) Review the exercise of discretion by the department to impose a civil money penalty; or
    - (3) Consider any factors in reviewing the amount of the penalty other than the factors described in subsection 6 of section 75-02-05.2-04 and the facility's degree of culpability. For purposes of this paragraph, "culpability" includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty.

5. An appeal may be perfected by mailing or delivering the information described in subdivisions a through c to the appeals supervisor. The mailed or delivered material must arrive at the office of the appeals supervisor on or before five p.m. on the sixtieth day after the date the appealing party is provided notice of an action appealable under subdivision a of subsection 1. The appeal request must include:
  - a. A statement of each disputed deficiency and the reason or basis in fact for the dispute;
  - b. The authority in statute or rule upon which the appealing party relies for each disputed item; and
  - c. The name, address, and telephone number upon whom all notices regarding the appeal must be served.
6. An appeal of a deficiency may not suspend or delay enforcement action except as provided in this section and chapter 75-02-05.2.
7. If an intermediate care facility for the mentally retarded requests a hearing concerning a finding of noncompliance with medicaid program requirements that has resulted in an action under paragraph 2 of subdivision a of subsection 1, the evidentiary hearing must be completed within one hundred twenty days after the effective date of the action based on that finding.
8. If a nursing facility requests a hearing on the denial or termination of its provider agreement, the request does not delay the denial or termination and the hearing decision need not be issued before the effective date of the denial or termination.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995; February 1, 1997.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1; 42 CFR 431.151, et seq.

**75-01-03-21. Submission of proposed decision.** After the hearing has been closed, the hearing officer shall issue a recommended decision for review by the appeals supervisor and submission to the executive director, the executive director's designee, or the director of vocational rehabilitation. The recommended decision must include a statement of the facts and of the statutes, regulations, rules, or policies involved and the reasoning that supports the recommended decision.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-22. Decision by department.**

1. The decision of the department must be made by the executive director, or the executive director's designee, except in appeals from vocational rehabilitation decisions. In vocational rehabilitation matters, the decision must be made by the director of vocational rehabilitation, who shall notify the executive director of the decision.
2. The executive director, or the executive director's designee, after receiving the hearing officer's recommended decision may:
  - a. Adopt the recommended decision in its entirety;
  - b. Decide the matter on the record; or
  - c. Order another hearing to be conducted.
3. Prior to taking action under subsection 2, the executive director, or the executive director's designee, may secure assistance or advice from staff assistants:
  - a. Without the communication of advice or assistance being treated as an ex parte communication in violation of North Dakota Century Code section 28-32-12.1, if the assistants do not furnish, augment, diminish, or modify the evidence in the record; or
  - b. After transmitting the relevant information or evidence, or an abstract thereof, to each party of record in the appeal, and affording each party an opportunity to examine the information, evidence, or abstract, and to present the party's own information or evidence in a hearing to be called on at least ten days' notice, all pursuant to North Dakota Century Code section 28-32-07, if the communication of advice or assistance furnishes, augments, diminishes, or modifies the evidence in the record.
4. For purposes of this section, staff communications that analyze the correct application of law, rule, regulation, or policy to the evidence in the record do not furnish, augment, diminish, or modify the evidence in the record and do not constitute relevant information or evidence that require notice of an ex parte communication pursuant to North Dakota Century Code section 28-32-12.1 or furnishing a copy of the advice or assistance to each party of record in the proceeding pursuant to North Dakota Century Code section 28-32-07.

5. The decision rendered for the department must be in writing. It must include a statement of the facts and of the statutes, regulations, rules, or policies involved and the reasoning which supports the decision.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-23. Notice of decision.**

1. After a decision is rendered by the director of vocational rehabilitation or the executive director, the appeals supervisor shall mail a copy to the claimant and the county agency, nursing facility, or unit of the department that made the determination under appeal. The notice of decision must also contain a statement explaining the right to request a rehearing or reconsideration unless the decision is itself a decision on rehearing or reconsideration.
2. The notice may be mailed by certified mail, return receipt requested, by certified mail, or by regular mail. If notice is given by certified mail without return receipt or by regular mail, an affidavit of mailing indicating to whom the order was mailed must be prepared.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

**75-01-03-24. Preservation of record.** The verbatim record of the testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, the hearing officer's recommended decision, and the department's decision constitute the exclusive record for decision and must be available to the parties to the appeal at any reasonable time for three years after the date of the department's decision in all food stamp cases, and for ninety days after the date of the department's decision in all other cases. A transcribed copy of recorded testimony requested within ninety days after the date of the department's decision must be made available to the claimant or a county agency upon payment of a reasonable transcription fee.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1

#### **75-01-03-25. Rehearing and reconsideration.**

1. A request for a rehearing or for reconsideration must be filed with the office of the appeals supervisor within fifteen days after a decision is issued by the executive director. The request must be based upon new evidence indicating that an unjust or invalid determination has been made, or upon an allegation that the director has incorrectly interpreted relevant statutory or case law.
2. If the request for rehearing is to permit presentation of additional evidence, the request must:
  - a. Describe the additional evidence;
  - b. Show why it was not previously introduced; and
  - c. Explain its materiality.
3. The executive director may order a rehearing, or may reconsider, on the director's own motion.
4. The grant of a rehearing or reconsideration, either upon request or upon the director's own motion, is a matter for the director's discretion.
5. If a request for a rehearing or reconsideration is granted, the director may:
  - a. Order reconsideration of the decision on the basis of the evidence in the record;
  - b. Order the taking of additional evidence; or
  - c. Order an entire new hearing.
6. A decision issued upon a request for rehearing or for reconsideration must not be subject to further hearing.
7. Notice of a decision upon a request for rehearing or for reconsideration must be given as provided for in section 75-01-03-23.

**History:** Effective September 1, 1979; amended effective January 1, 1984; February 1, 1995.

**General Authority:** NDCC 28-32-02, 50-06-16

**Law Implemented:** NDCC 50-06-05.1